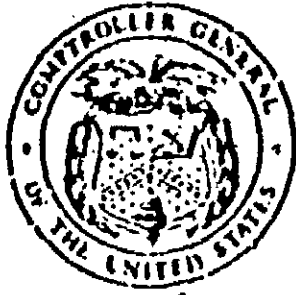


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-185884

DATE: October 21, 1976

MATTER OF: Data 100 Corporation Reconsideration

DIGEST:

Prior decision, holding that while proposals were not evaluated on common basis award would not be disturbed where protester was not prejudiced, is affirmed, since contract termination is not regarded as appropriate where deficiency did not result in award that otherwise would not have been made, and since various other contentions made by protester do not warrant modification of decision.

The protester has requested reconsideration of its decision of July 26, 1976, B-185884, 76-2 CPD 80, issued in response to its protest under Department of Commerce (Commerce) request for proposals No. 6-35119. The initial protest involved the propriety of that agency's evaluation of proposed prices for rental and maintenance of specified types and quantities of Remote Job Entry Terminals.

The solicitation required on-call remedial maintenance during regular working hours, and further provided that for terminal types I, II, and V, on-call maintenance was required 24 hours per day, 7 days per week. The protester's offer contained lump sum monthly rental and maintenance figures for the equipment it was offering, while the successful offeror submitted lump sum monthly figures and a statement that it would charge \$125 per call for all maintenance calls outside regular working hours (referred to as principal period maintenance /PPM/ calls). Award was made to the successful offeror on the basis of its low evaluated monthly charges without regard to the charge for non-PPM calls.

The protester alleged that the solicitation provided only for the submission of total monthly charges for all equipment rental and maintenance, and that since the protester's price included all required maintenance while the successful offeror's prices failed to include the cost of non-PPM calls, proposals were not evaluated on a common basis.

Commerce reported that at the time it evaluated proposals it was unaware that all offerors had not submitted prices on the same basis. In this connection, it reported that custom and usage in the industry, as evidenced by Federal Supply Schedule (FSS) contracts, dictated the quotation of non-PPM calls as extra-charge items; that the protester had stated in its offer that it would provide maintenance as specified in the solicitation; and that the solicitation provided that the terms and conditions of an offeror's FSS contract would apply to the contract to be awarded. Therefore, it concluded that all offerors had correctly understood that non-PPM charges would be determined on the basis of an offeror's FSS contract (one of which was held by the protester).

We held that proposals were not evaluated on a common basis and that the protester's allegations therefore had merit. However, we declined to recommend termination of the contract because it did not appear that the protester was prejudiced by the agency's action. This latter determination was based on a post-award reconstruction of the successful offeror's total price which provided a "rough" comparison of that price, including non-PPM, and the protester's price.

The reconstruction consisted of multiplying the successful offeror's quoted figure of \$125 per non-PPM call by the average number of monthly calls for non-PPM (based on the agency's operating experience), multiplied further by the number of terminals for each of the three types at issue. The calculations were further adjusted to multiply by a factor of four the charges calculated for types I and II because, while those terminals were used on a 24-hour per day basis for only 3 months of the year, the protester's price had allegedly been submitted on a 12-month per year basis. These calculations showed that the successful offeror's "reconstructed" price would still be \$349,313 below the protester's price of \$2,051,242.

Although recognizing that the agency's post-award price reconstruction process was imperfect at best, we concluded that it was highly unlikely that the contractor's price would not have remained substantially lower than the protester's price even had its price included non-PPM calls. Since the relative competitive standing of the offerors had not been placed into doubt by the defects in the procurement, we did not recommend that the award be overturned. However, we did advise the Secretary of Commerce that steps should be taken to avoid a recurrence of the deficiencies noted in the procurement.

In requesting reconsideration, the protester disagrees with our resort to the post-award computations as a basis for "protest denial." The protester further contends that the computations were improper because they did not include an adjustment to the protester's prices to reflect 3-month rather than 12-month usage requirements for terminal types I and II. Several other objections to the decision are also raised.

We have carefully considered the protester's various statements and contentions. As indicated below, we find none of them provides any basis for a reversal of our decision.

First of all, the protester misunderstands the decision. We did not "deny" the protest. To the contrary, we agreed with the protester that the procurement was defective due to an inadvertent agency failure to evaluate offers on a common basis. The resort to the post-award agency price reconstruction was undertaken by this Office in an effort to determine whether, had the successful offeror submitted prices on the same lump-sum basis as the protester, there was any reasonable possibility that the relative price standing of the offerors would have been sufficiently clouded by the defect to warrant a recommendation of contract termination and resolicitation. As indicated above, it was apparent that the contractor's price would have remained substantially lower than the protester's so that the relative competitive standing of the two offerors was not placed into doubt by the procurement defect.

It has always been the position of this Office that a defect in a procurement does not automatically warrant termination of a contract. In cases where contract termination is feasible and it is clear that a bidder or offeror was or may have been unfairly or improperly denied an award because of a procurement deficiency, this Office will recommend that the improperly awarded contract be terminated for the convenience of the Government. See, e.g., Thomas Construction Company, Inc., et al., 55 Comp. Gen. 139 (1975), 75-2 CPD 101; Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365; Dyneteria, Inc., 54 Comp. Gen. 536 (1975), 75-1 CPD 22; S. Livingston & Son, Inc., 54 Comp. Gen. 593 (1975), 75-1 CPD 24; Jacobs Transfer, Inc., et al., 53 Comp. Gen. 797, 74-1 CPD 213; 52 Comp. Gen. 409 (1973); 52 id. 47 (1972); National Health Services, Inc., B-186186, June 23, 1976, 76-1 CPD 401. However, where it is reasonably clear that the procurement deficiency did not result in an award that otherwise would not have been made, so that it cannot be said that the protesting party was unfairly deprived of a contract, we see no reason to disturb an on-going procurement and a

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contractual relationship between the Government and another party which did not contribute to or may not have been aware of the contracting agency's improper action. See UCE, Incorporated, B-186668, September 16, 1976, 76-2 CPD ____; Frank Coluccio Construction Company, Inc., B-185157, April 1, 1976, 76-1 CPD 215; Engineered Handling Systems, et al., B-184227, March 9, 1976, 76-1 CPD 163; 52 Comp. Gen. 320 (1973); see also Thomas Construction Company, Inc., B-184810, October 31, 1975, 75-2 CPD 248.

In this case, we found that it was not likely that Data 100 would have been in line for award even if all offerors had submitted prices on the same basis. We remain of that view, and therefore do not agree that this is an appropriate case for disturbing the contract awarded by Commerce.

With regard to the contention that the protester's prices should have been reduced to reflect a 3 rather than 12-month usage of types I and II, it should be noted that rather than reduce the protester's prices to reflect a 3-month usage, we multiplied, by a factor of four, the contractor's reconstructed prices for types I and II so that they could be compared with the protester's on a common basis reflecting 12-month usage. Accordingly, we see no merit to this contention.

The protester also suggests that since prices were submitted on an unequal basis, the agency should have conducted negotiations and permitted offerors to submit subsequent proposal revisions. It also contends that negotiations were required because the agency's "after-award" price reconstruction constituted a modification of the non-PPM requirements of the solicitation.

We cannot agree. Had the fact that prices were not submitted on a common basis come to light prior to award, a request for revised offers on a common basis would have been appropriate. However, Commerce did not learn of that situation until the protest was filed after award of the contract. Moreover, the non-PPM requirements of the solicitation were not "revised" after award. Rather, the contractor's price was merely "analyzed" in an attempt to determine roughly what its pricing would have been had its non-PPM costs been submitted on the same basis as Data 100's pricing.

The protester alludes to section C.21 of the solicitation, which provided that proposals submitted on other than a firm fixed price basis would be considered nonresponsive, and states

that since the contractor's non-PPM charges were not submitted on a fixed price basis, its proposal must be considered non-responsive. As indicated in our decision, Commerce felt that it had received prices consistent with custom and usage for fixed price Federal Supply Service contracts under which non-PPM calls are quoted and considered as "extra-charge" items. Furthermore, although the total cost for non-PPM calls is not fixed under the contract awarded because it is not known how many non-PPM calls will be required, we point out that under the contract non-PPM calls are treated as an indefinite delivery type requirement and that the \$125 per call is regarded as a firm fixed price. See Federal Procurement Regulations 8 1-3.409 (1964 ed.).

The protester next contends that there is no evidence that the Table of Discount Factors, set out on pages 18 and 19 of the solicitation, was applied to the evaluation of prices. This allegation was first received in our Office on August 6, 1976, notwithstanding that the protester was furnished in April 1976 with an agency report on its original protest which included a detailed cost analysis summary of the prices submitted by all offerors. Our Bid Protest Procedures, 4 C.F.R. Part 20 (1976) require that protest allegations be filed not later than 10 working days after the basis for the protest is known or should have been known, whichever is earlier. 4 C.F.R. 20.2(b)(2). This allegation therefore is untimely filed and ineligible for consideration on the merits.

Finally, the protester takes exception to the conclusion in our decision that one of its protest allegations was untimely filed under our Bid Protest Procedures. In its original protest, the protester contended that the solicitation was defective for failing to include the Government's estimate of non-PPM calls to be required under the contract. Noting that the protester computed its price without the availability of such an estimate and without question or objection to its absence, we held that the allegation was untimely filed under 4 C.F.R. 20.2(b)(1), which provides that protests based upon alleged improprieties in a solicitation which are apparent prior to closing date for receipt of proposals must be filed prior to such date.

In requesting reconsideration the protester contends that it had no knowledge of the "improper procedures" employed by the agency prior to notification of award. The protester apparently misunderstands the basis for our conclusion. This particular untimeliness finding was predicated upon the protester's failure

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to object to a solicitation defect and not to the evaluation procedures actually utilized. In other words, if the protester could not properly compute its price under the RFP without the availability of a Government estimate, it was incumbent upon it to protest this matter prior to the closing date for receipt of proposals.

In view of the above, our prior decision is affirmed.


Deputy Comptroller General
of the United States